licensees for limited periods carries significant First Amendment consequences."[27] In other words, the FCC views its licensees the same way Sen. Jesse A. Helms (R-N.C.) views the National Endowment for the Arts: He who pays the piper calls the tune.

Contrary to the government's rather facile analysis, its decision to treat its licensing policies as a form of subsidy does not give it greater authority to control speech. The fact that the government nationalized the physical properties that make up the broadcast spectrum and labeled them "public resources" does not entitle it to reshape the First Amendment. Cities build and own public parks, but cannot demand that demonstrators who speak therein give public service announcements;[28] municipalities issue parade permits, but cannot demand that the marching bands play military music or that certain groups be allowed to join the procession;[29] cities allow (and even license) newsboxes on public rights of way, but are barred by the First Amendment from regulating the content of the publications placed inside.[30] The social compact, no matter how much it is "reinvented," does not alter basic constitutional principles.

Social compacts and unconstitutional conditions

It is more than a little disingenuous to characterize a licensing decision or other regulatory approval as a simple "subsidy." Such decisions are not like other public benefits that the would-be recipient may either take or leave. The FCC is the only game in town for its licensees, and applicants who fail to win its approval are out of business. Yet even if the subsidy characterization were apt, the First Amendment is offended by the specific conditions that social compacts entail.

The unconstitutional conditions doctrine provides that the government generally cannot confer a benefit in exchange for the relinquishment of a constitutional right, even though the recipient does not have a "right" to receive the benefit in the first instance. Calling the exchange a contract (or even a compact) does not affect this analysis, for the government cannot employ indirect means to "pro-

duce a result which [it] could not command directly."[31] This doctrine replaced what had been referred to as the "right-privilege" distinction. As a justice of the Massachusetts Supreme Court in 1892, Oliver Wendell Holmes articulated the right-privilege distinction in *McAuliffe v. Mayor of New Bedford*: "The petitioner may have a right to talk politics, but he has no constitutional right to be a policeman."[32] He applied this reasoning to speech on public property in a subsequent case, writing that "absolutely or conditionally to forbid public speaking in a highway or public place is no more an infringement of the rights of a member of the public than for the owner of a private house to forbid it in his house."[33]

In the 20th century, the doctrine of unconstitutional conditions has supplanted this right-privilege distinction.[34] In *Frost & Frost Trucking Co. v. Railroad Commission of California*, for example, the Supreme Court struck down a state requirement that conditioned the use of public highways on a private carrier's agreement to operate as a common carrier. The Court did not question the state's authority (for the proper health, safety, or other reasons) to withhold from the carrier the valuable right to operate on the highways. But it could not make the benefit contingent upon the carrier's willingness to accept special regulatory obligations, because, the Court held, "one of the limitations [on any government's power to grant benefits] is that it may not impose conditions which require the relinquishment of constitutional rights." Such a choice, according to the Court, is "a choice between the rock and the whirlpool."[35]

A more current expression of this principle came in *Nollan v. California Coastal Commission*.[36] There, the Supreme Court invalidated a demand that a property owner grant a public easement to its land in exchange for the issuance of a building permit. Writing for the Court, Justice Scalia highlighted the constitutional infirmity of such a condition by describing the "deal" in free speech terms. The state could forbid "shouting fire in a crowded theatre," he wrote, but it could not grant "dispensations to those willing to contribute $100 to the state treasury."[37]

Although *Nollan* was not a First Amendment case, Justice Scalia's analogy was quite appropriate because the Court has stressed over

the years that the government "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests — *especially, his interest in freedom of speech.*"[38] In *Speiser v. Randall*, for example, the Supreme Court invalidated a California provision that conditioned a tax benefit upon the recipient's signing a loyalty oath.[39] In other cases, courts have struck down government conditions that limited freedom of expression in exchange for public employment,[40] liquor licenses,[41] NEA grants,[42] public broadcasting subsidies,[43] and government contracts.[44]

This is not to suggest that the doctrine has been consistently applied or easily understood. In *Rust v. Sullivan*, for example, the Supreme Court upheld grant conditions under Title X of the Public Health Service Act that precluded any recipient from providing "counseling concerning the use of abortion as a method of family planning or provid[ing] referral for abortion as a method of family planning."[45] To receive a Title X grant, a recipient had to agree to forego abortion advocacy and counseling and to separate its project from any abortion-related activities. A divided Court found that "the government is not denying a benefit to anyone" but instead is "simply insisting that public funds be spent for the purposes for which they were authorized."[46] The Court found that the conditions did not restrict the recipients' First Amendment rights because the grantee organization and its employees "remain free...to pursue abortion-related activities when they are not acting under the auspices of the Title X project."[47] The core distinction recognized by the majority between the Title X restrictions and other cases involving unconstitutional conditions was that the limitations applied to the grant, and not to the recipient organization or its employees *per se*. Either were free to engage "in the protected conduct outside the scope of the federally funded program."[48]

This analysis in *Rust* drastically undermines any argument for imposing content controls in exchange for an FCC license as part of a social compact. As noted previously, the FCC holds the monopoly on licensing authority; would-be broadcasters cannot make deals with another agency if they dislike the FCC's terms. The only option is to forego broadcasting entirely. Indeed, the *Rust* majority high-

lighted this point by reference to *FCC v. League of Women Voters of California*, in which the Court found that a ban on editorializing by stations that received public funding was an unconstitutional condition.[49]

Since *Rust*, the unconstitutional conditions doctrine has made something of a comeback. In a pair of cases decided at the close of the 1995 Term, the Supreme Court revitalized the doctrine and extended its reach to independent government contractors. In *O'Hare Truck Service, Inc. v. City of Northlake*[50] and *Board of County Commissioners, Wabaunsee County v. Umbehr*,[51] the Court held that local governments could not cancel contracts in retaliation for the exercise of First Amendment rights. In *O'Hare*, a private towing service had been dropped from a government rotation list of available firms after the company's owner refused to contribute to the incumbent mayor's reelection campaign, and instead publicly supported the mayor's opponent. In *Umbehr*, a private at-will contractor for trash hauling service was denied renewal of his contract after publicly criticizing the county board. The principal question in both cases was whether private contractors should be treated differently than government employees who are punished after speaking out on a matter of public concern. The Court held that they should not, and that there is no material difference between the threat of job loss to an employee and the threat of loss of a contract to a contractor.[52]

Also, near the end of the 1995 Term, the Supreme Court invalidated a state law that conditioned the grant of a liquor license on certain advertising restrictions, holding unanimously that the commercial speech limits violated of the First Amendment. Four of the justices agreed that the state law imposed an unconstitutional condition, and referred to the "host of cases applying that principle during the preceding quarter century."[53] Consequently, even though the state had a valid regulatory interest, and was empowered to license private businesses to engage in that business, it was nevertheless barred by the First Amendment from conditioning the grant of such licenses on advertising restrictions. There is a lesson for the FCC here.

Social compacts and the special case of public broadcasting

Cases involving the constitutional status of public broadcasters are especially relevant to this analysis. Such broadcasters, after all, receive a double subsidy (assuming you agree with the FCC's current characterization of its licensing power). First, like all broadcasters, public stations are licensed to use the radio spectrum for free. Additionally, such stations receive direct payments from the government to support their programming. The FCC considers the two "subsidies" to be indistinguishable. Indeed, in a recent brief filed in the U.S. Court of Appeals for the Eighth Circuit, the Commission noted that "Congress and the FCC have made substantial commitments of public resources, in the form of federal funds and frequency allocations, to the development of a system of noncommercial educational broadcasting."[54]

Because of the financial subsidy, public broadcasters have long been subjected to the same types of pressures that are now arising under the rhetoric of the "social compact." Public broadcasting is a political battleground because of the nature of its programming. Conservatives perennially charge that public broadcasting is biased toward the left; liberals argue that it is influenced by corporate underwriting and pressure from conservative politicians.[55] Patrick Buchanan, as an advisor to President Nixon, classified liberal commentators on PBS variously as "definitely anti-administration," "definitely not pro-administration," and "unbalanced against us," and the few conservative commentators on public broadcasting as "a fig leaf."[56] Similarly, Dr. Clay T. Whitehead, the first director of the White House Office of Telecommunications Policy, told PBS officials that news commentary, "particularly from the Eastern intellectual establishment," would invite political attention.[57]

Of course, the Nixon Administration is not the only one to feel put upon by the press. In a recent C-SPAN interview, the current First Lady, Hillary Rodham Clinton, complained that overall news coverage of the Clinton Administration was dominated by "right wing, conservative" media organizations. "You've got a conservative and/or right wing press presence with really nothing on the other end

of the political spectrum," she said.[58] Her critique was not directed at public broadcasting, but it demonstrates the basic principle that when any administration is subjected to press scrutiny, it tends to believe it is being treated unfairly.

Another basic principle is that whenever a matter of programming content "invite[s] political attention," those in power gravitate to where they have the most leverage. As famed Watergate source "Deep Throat" reportedly advised Bob Woodward in a rather different context, "follow the money." So, in February 1972, Whitehead informed Congress that the Nixon Administration opposed any permanent financing for the Corporation for Public Broadcasting unless local public stations were given greater power to control programming.[59] The Administration had concluded that PBS should not be allowed to develop into a fourth network producing public affairs programming because of the Administration's belief that such programming would be hostile to its policies.[60] The concern ultimately led to President Nixon's veto of the public broadcasting authorization bill in June 1972. Buchanan, by all accounts, was characteristically blunt about the Administration's intent. He reportedly told a public broadcasting executive at a cocktail party: "If you don't do the kind of programming we want, you won't get a f------ dime."[61]

Not only does the direct subsidy provided to public broadcasters reveal politicians' real attitudes, it also represents an important test of the hypothesis that the government may demand specific programming commitments in exchange for economic support. This hypothesis is the heart of the social compact, but there is nothing in the history of public broadcasting to support its legality. Generally, public stations "are subject to no more intrusive content regulation than their commercial counterparts."[62] In the past, there were two principal exceptions to the general rule that noncommercial stations had the same public interest obligations as commercial stations: Public stations were required to make and retain tape recordings of "controversial programs" and they were prohibited from editorializing.[63] Both of these heightened public interest requirements, however, were struck down as First Amendment violations.[64]

In *FCC v. League of Women Voters of California*, the Supreme Court held that a rule prohibiting public broadcast stations from editorializing violated the First Amendment. The government had argued that the restriction was based on "the proper exercise of its spending power," and that the government was not obligated to "subsidize public broadcasting station editorials."[65] The Supreme Court rejected this argument, holding that the funding limitation was far too restrictive of the First Amendment rights of public station licensees. In *Turner Broadcasting System v. FCC*, the Court noted that educational stations, in addition to being granted the free use of spectrum, also received funding through the Corporation for Public Broadcasting. Nevertheless, it found that "the Government is foreclosed from using its financial support to gain leverage over any programming decisions."[66]

Similarly, In *Community-Service Broadcasting v. FCC*, the D.C. Circuit invalidated a requirement that public broadcast stations retain tape recordings of programs "in which any issue of public importance is discussed." Judge Skelly Wright, who wrote the opinion for the court as well as a plurality opinion, said it was irrelevant that the taping requirement was both content and viewpoint neutral. The requirement "provide[d] a mechanism, for those who would wish to do so, to review systematically the content of public affairs programming."[67] Judge Wright noted the implicit threat that if "public affairs programming by noncommercial licensees is perceived by government functionaries to be anything less than scrupulously objective and balanced, then action may be taken against the licensees or further legislation enacted."[68] According to Judge Wright, the chilling effect of the government's control over funding simply increased the level of "raised eyebrow" oversight that the government often applies to licensed media. The plurality opinion also applied the unconstitutional conditions doctrine:

> Clearly, the existence of public support does not render [public] licensees vulnerable to interference by the federal government without regard to or restraint by the First Amendment. For while the Government is not required to provide federal funds to broadcasters, it cannot condition

> receipt of those funds on acceptance of conditions which could not otherwise be constitutionally imposed.[69]

Other cases involving public subsidies of speech resulted in findings that the First Amendment had been violated. In these cases, involving conditions imposed on grants by the National Endowment for the Arts, the courts found that the prospective recipients did not have a "right" to a federal subsidy, but that they nevertheless could not be burdened with unconstitutional content restrictions in order to obtain the grant. Consequently, the courts held that indecency-type conditions imposed on NEA grants are unconstitutional.[70] Of particular relevance to the FCC's social compact theory as it relates to electromagnetic spectrum, the U.S. Court of Appeals for the Ninth Circuit held that the government could not justify such conditions by characterizing as "scarce" the government benefit at issue.[71]

Selling indulgences

The Reformation was launched in 1517 when Martin Luther published his famous "95 Theses," objecting to the practice of selling indulgences. A person who bought an indulgence (which were sold with the Church's approval) received in exchange an assurance that his or her time in purgatory would be reduced. Little did Luther know that the practice would be revived — at least in secular terms — 480 years later by the FCC.

Cable operators now are allowed to "atone" for overcharging subscribers by pledging to provide connections to schools;[72] broadcast networks may obtain the salvation of ownership waivers by promising to provide children's programming;[73] and it has been proposed that broadcasters may purchase other forms of regulatory grace by making "specific and concrete" programming offers.

These developments parallel the Commission's prior practice of incorporating citizen agreements with licensees into its decision-making process. In the mid-1970s, the FCC adopted a policy by which it would formally include "citizen agreements" in its rulings on license renewals and other applications. At the time,

Commissioner Benjamin Hooks described the agreements as a "social contract" between a licensee and its fiduciary client, the public.[74] Moreover, the Commission described the situation in which a citizens' group would agree to drop a petition to deny in exchange for contractual promises as a "quid pro quo."[75] Under the policy, the written agreements could relate to a broadcaster's programming policies or other aspects of station operation, such as employment practices. The terms of the agreement "assume[d] the status of representations to the Commission" and were "treated by the Commission as are all promises of future performance."[76]

As might have been predicted, the Commission's experience with this policy was an embarrassment. After much unfortunate experience, the FCC found that "groups or individuals were filing petitions and counterproposals to extract monetary or other consideration rather than for the proper purpose of identifying deficiencies in applications or to operate a broadcast facility."[77] In particular, the Commission found that petitions to deny were being used "as a vehicle to extort large settlement payments or to force licensees into citizens' agreements...."[78] It found that the administrative delay caused by such demands, and the drag on licensing, transfer, or assignment proceedings "gives the applicant an incentive to settle even frivolous challenges rather than to engage in a time consuming and costly defense."[79] As a result of these findings, the Commission adopted strict limits on the ability of citizens' groups to profit from their filings and agreements in FCC proceedings.[80] Additionally, the FCC decided that it would no longer enforce private contractual agreements relating to programming in citizens' agreements. The Commission found that such agreements were contrary to the general policy of content deregulation that existed at that time.[81]

The abuses that led to the curtailment of citizen group "social contracts" should provoke a sobering assessment of the FCC's much touted social compacts. Power can be its own reward, after all, and some experienced observers have equated the profit motive that generated many citizen group "social contracts" with the bureaucratic quest for expanded authority. Former Minnesota Supreme Court Justice and FCC Commissioner Lee Loevinger (a Kennedy

appointee) has said that the "power motive" is to bureaucracy what the profit motive is to business.[82] As a result, according to other noted analysts: "The FCC Commissioners and staff members seek almost daily to perpetuate and extend their own power."[83]

A major difficulty with the social compact is that it knows no bounds. Although it is a simple matter to assert that regulated media owe "something" in return for the regulatory largess that permits them to exist, there is no readily apparent limiting principle that would circumscribe this assertion of authority. For that reason, Chairman Hunt has described the potential social benefits of this approach as an "opportunity to order up from a wish list what we think is best for the country."[84] Ultimately, the magnitude of this wish list is bounded only by the lack of imagination (or sense of restraint) of those who occupy the seats of power.

So far, the social compact has been pitched both as a way to promote "good" programming content (*e.g.*, educational shows and free time for politicians) and to restrict "bad" programming (*e.g.*, indecency, violence, and advertisements for distilled spirits). Such measures inevitably are defended as being "minimal," but this is First Amendment theory as taught at barber school: "Don't worry, we're only taking a little bit off the top." Even when the wish list starts out as being limited, it does not stay that way for long. Thus, social compact theory began as a regulatory rationalization for controlling broadcast content and quickly expanded to cover "all media," including the Internet.

This trend is evident even when considering particular regulations, such as the V-chip requirement. As initially proposed, this bit of automated parenting began as a proposal to limit only "violent" programming. When finally adopted, however, the law grew to restrict "video programming that contains sexual, violent, or other indecent material about which parents should be informed before it is displayed to children."[85] Like the Energizer Bunny, the wish list just keeps going and going and going....

Quid pro free TV

Surely — a reasonable person might say — the government can demand some public benefit from making spectrum available for broadcasting or other communicative purposes. And if controlling the programming content is constitutionally foreclosed, what possible benefit is left for the government to ask in return? Is it possible to form a social compact that does not violate the First Amendment?

As it turns out, the government's defense of must-carry rules provides one strong answer to these questions. By these rules, adopted as part of the 1992 Cable Act, Congress compelled cable operators to carry local broadcast stations in order to preserve the system of local broadcasting. In reviewing this justification, the Supreme Court accepted the congressional findings of "a substantial governmental interest in promoting the continued availability of such free television programming, especially for viewers who are unable to afford other means of receiving programming."[86] Under this reasoning, the "social compact" is met when licensees provide free universal television programming "whatever its content," and not because of a bureaucratically prescribed mandate for pro-social fare.

Indeed, the Supreme Court in *Turner Broadcasting System* stressed that Congress's overriding objective in enacting must-carry "was not to favor programming of a particular subject matter, viewpoint or format, but rather to preserve access to free television programming for the 40 percent of Americans without cable."[87] The Court said that this aspect of broadcasting — free universal coverage of the country — made it "a vital part of the Nation's communications system" ensuring "that every individual with a television set can obtain access to free television programming."[88]

This seems like a pretty fair deal. Broadcasters obtain a license to use the spectrum without charge in exchange for providing free universal service. The Supreme Court, taking Congress at its word, suggested that such service satisfies a substantial governmental interest. The same rationale supports the allocation of free digital spectrum to existing broadcasting licensees. Such an allotment has been proposed to enable broadcasters to transition from analog delivery of

television signals to new digital services. The imposition of additional regulatory obligations as part of the "fee" for obtaining the spectrum would work against the goal of universal access to free digital television services.

Proponents of the social compact have asserted that, in addition to free spectrum usage, regulatory benefits such as must-carry obligate broadcasters to provide more pro-social programming. But this formulation of the "deal" is precisely backwards. Broadcasters do not "earn" must-carry rights by providing the type of programming favored by bureaucrats. Rather, the government concluded that it was obligated to mandate must-carry because broadcast programming is free to the consumer. Indeed, the Supreme Court specifically rejected the suggestion "that Congress's purpose in enacting must-carry was to force programming of a 'local' or 'educational' content on cable subscribers."[89] It noted that cable operators have the option of replacing a cable channel offering large amounts of educational programming with a local broadcast station that provides very little such programming.[90]

Whatever justification the government employs, however, the Supreme Court in *Turner* went out of its way to emphasize that the government's authority over broadcast content was "minimal," and that the risk of enlarging government control over programming content is of "critical importance" to the First Amendment.[91] The Court stressed that "the FCC's oversight responsibilities do not grant it the power to ordain any particular type of programming that must be offered by broadcast stations" and that "the Commission may not impose upon [broadcast licensees] its private notions of what the public ought to hear."[92]

Cable operators and programmers have First Amendment rights as well, and it is expected that the must-carry rules will be struck down when the Supreme Court revisits the issue in *Turner II*. This casts further doubt on the social compact, not because broadcasters will have less of a "quid pro quo" obligation, but because the First Amendment will have trumped yet another attempt at social engineering by the government. This will not diminish the finding in *Turner I* that a system of free broadcasting — without programming

mandates — should be enough to fulfill any social compact. But it should slow down the tendency to add more items to the social compact wish list.

Notes - Chapter 3

[1] Kim McAvoy, *Hundt's New Deal*, BROADCASTING & CABLE, Aug. 1, 1994 at 6.

[2] Speech by FCC Chairman Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, University of Pittsburgh School of Law (Sept. 21, 1995).

[3] *Id.*

[4] *Administration Official Defends FCC Role in Content Regulation*, WASHINGTON TELECOM WEEK, April 19, 1996 at 1, 2. *See* Harry A. Jessell, *The Fall of the First*, BROADCASTING & CABLE, Aug. 12, 1996 at 12.

[5] FCC Chairman Reed E. Hundt, *The Hard Road Ahead — An Agenda for the FCC in 1997* (Dec. 26, 1996).

[6] *Id.* at 14.

[7] *See FCC Grants the Applications for Transfer of Control of Broadcast Licenses and Permits of Capital Cities/ABC, Inc. to the Walt Disney Company and Grants Various Waivers of its Multiple Ownership Rules, While Denying Others*, Rep. No. MM 96-8 (Feb. 8, 1996) (statement of Chairman Reed E. Hundt).

[8] *Id.*

[9] Speech by FCC Chairman Reed E. Hundt, American Psychological Association Annual Convention, Los Angeles (Aug. 13, 1994); speech by FCC Chairman Reed E. Hundt, International Radio & Television Society, New York (Oct. 19, 1994).

[10] Speech by FCC Chairman Reed E. Hundt, Children's Action Network, Los Angeles (Nov. 19, 1996).

[11] *E.g.*, *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986).

[12] *Id.* at 62.

[13] Speech by Alfred C. Sikes, International Radio & Television Society, New York (Sept. 19, 1991). *See FCC Chief Says Broadcasters Should Clean Up Act if They Want Government Help*, Associated Press, Sept. 23, 1991.

[14] Speech by Rep. Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Broadcasting & Cable Interface Conference VIII, Washington, D.C. (Oct. 4, 1994).

[15] *See* COMMUNICATIONS DAILY, Feb. 3, 1994 at 1-2.

[16] Speech by Rep. Edward J. Markey, *supra* note 14.

[17] *E.g.*, Reed E. Hundt and Karen Kornbluh, *Renewing the Deal Between Broadcasters and the Public: Requiring Clear Rules for Children's Educational Television*, 9 HARV. J. LAW & TECHNOLOGY 11, 16-19 (Winter 1996).

[18] *See* Robert Corn-Revere, *Regulation in Newspeak: The FCC's Children's Television Rules*, Cato Institute Policy Analysis No. 268, Feb. 19, 1997.

[19] Speech by FCC Chairman Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, *supra* note 2.

[20] Kim McAvoy, *Hundt's New Deal*, BROADCASTING & CABLE, Aug. 1, 1994 at 6.

[21] Speech by FCC Chairman Reed E. Hundt, *Reinventing the Social Compact*, Broadcasting & Cable Interface Conference, Washington, D.C. (Sept. 24, 1996) (emphasis added).

[22] Hundt, *The Hard Road Ahead*, *supra* note 5 at 18-19.

[23] *In the Matter of Access Charge Reform*, FCC 96-488 (released Dec. 24, 1996) at ¶¶283, 285 ("*Access Charge Reform*").

[24] Speech by FCC Chairman Reed E. Hundt, *A New Paradigm for Broadcast Regulation*, *supra* note 2.

[25] *Access Charge Reform*, *supra* note 23 at ¶288.

[26] Speech by FCC Chairman Reed E. Hundt, *Children and the Information Superhighway: Directions for the Future*, Children Now Conference, Menlo Park, Calif. (Sept. 27, 1996).

[27] *Policy and Rules Concerning Children's Television Programming*, 11 FCC Rcd. 10,660, 10,729 (1996) ("*Children's Television Order*").

[28] *Riley v. National Federation of the Blind of North Carolina*, 487 U.S. 781 (1988).

[29] *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 115 S. Ct. 2338, 2347-48 (1995).

[30] *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 419 (1993).

[31] *Speiser v. Randall*, 357 U.S. 513, 526 (1958); *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

[32] *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517-18 (1892).

[33] *Davis v. Massachusetts*, 162 Mass. 510, 511, 39 N.E. 113, 113 (1895), *aff'd*, 167 U.S. 43 (1897).

[34] *See* William Van Alstyne, *The Demise of the Right-Privilege Distinction in Constitutional Law*, 81 HARV. L. REV. 1439 (1968).

[35] *Frost & Frost Trucking Co. v. Railroad Comm'n of Calif.*, 271 U.S. 583, 593, 594 (1926).

[36] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

[37] *Id.* at 837.

[38] *Perry v. Sindermann*, 408 U.S. at 597 (emphasis added).

[39] *Speiser v. Randall*, 357 U.S. 513 (1958). *See also Wieman v. Updegraff*, 344 U.S. 183, 191 (1952).

[40] *Rutan v. Republican Party of Ill.*, 497 U.S. 62 (1990); *Rankin v. McPherson*, 483 U.S. 378 (1987); *Branti v. Finkel*, 445 U.S. 507 (1980); *Abood v. Detroit Bd. of Educ.*, 431 U.S. 209 (1977); *Elrod v. Burns*, 427 U.S. 347 (1976); *Perry v. Sindermann*, 408 U.S. at 597; *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968).

[41] *44 Liquormart, Inc. v. Rhode Island*, 116 S. Ct. 1495, 1513 (1996).

[42] *Finley v. National Endowment for the Arts*, 100 F.3d 671 (9th Cir. 1996); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

[43] *FCC v. League of Women Voters of Calif.*, 468 U.S. 364 (1984).

[44] *O'Hare Truck Service, Inc. v. City of Northlake*, 116 S. Ct. 2353 (1996); *Board of County Comm'rs Wabaunsee County v. Umbehr*, 116 S. Ct. 2342 (1996).

[45] *Rust v. Sullivan*, 500 U.S. 173, 179-80 (1991).

[46] *Id.* at 194, 193.

[47] *Id.* at 196.

[48] *Id.* at 197.

[49] *Id.*

[50] *O'Hare Truck Service v. Northlake*, 116 S. Ct. 2353 (1996).

[51] *Wabaunsee County v. Umbehr*, 116 S. Ct. 2342 (1996).

[52] *Id.* at 2349; *O'Hare Truck Service v. Northlake*, 116 S. Ct. at 2358-59.

[53] *44 Liquormart v. Rhode Island*, 116 S. Ct. at 1513.

[54] Brief Amicus Curiae for the Federal Communications Commission. *Marcus v. Iowa Public Television*, No. 96-3645 (8th Cir., filed Jan. 15, 1997) at 3.

[55] *See generally, The Future of Public Broadcasting*, 3 COMINT 1-32 (Fall 1992); *Public Broadcasting*, THE CQ RESEARCHER, Sept. 18, 1992 at 812-14, 820-24 ("THE CQ RESEARCHER").

[56] THE CQ RESEARCHER, *supra* note 55 at 822.

[57] *Id.* at 820.

[58] Peter Baker, *Hillary Clinton Bemoans Influence of "Right Wing" Media*, WASHINGTON POST, Jan. 18, 1997 at A11.

[59] Irwin G. Krasnow, Lawrence D. Longley, and Herbert A. Terry, *The Politics of Broadcast Regulation*, 3d Ed. (1982) at 71.

[60] Lucas A. Powe, Jr., *American Broadcasting and the First Amendment* (1987) at 129.

[61] *Id.* (euphemism in original).

[62] *Turner Broadcasting System, Inc. v. FCC*, 114 S. Ct. 2445, 2463 (1994).

[63] *See Accuracy in Media v. FCC*, 521 F.2d 288, 291 (D.C. Cir. 1975), *cert. denied*, 425 U.S. 934 (1976).

[64] *FCC v. League of Women Voters of Calif.*, 468 U.S. 364 (1984) (editorial ban invalidated); *Community-Service Broadcasting of Mid-America, Inc. v. FCC*, 593 F.2d 1102 (D.C. Cir. 1978) (*en banc*) (taping requirement struck down).

[65] *FCC v. League of Women Voters*, 468 U.S. at 399.

[66] *Turner Broadcasting System v. FCC*, 114 S. Ct. at 2464.

[67] *Community-Service Broadcasting v. FCC*, 593 F.2d at 1116 (D.C. Cir. 1978) (*en banc*).

[68] *Id.* at 1117-18.

[69] *Id.* at 1110.

[70] *See Finley v. National Endowment for the Arts*, 100 F.3d. 671 (9th Cir. 1996); *Bella Lewitzky Dance Foundation v. Frohnmayer*, 754 F. Supp. 774 (C.D. Cal. 1991).

[71] *Finley v. NEA*, 100 F.3d at 683, citing *Rosenberger v. Rector & Visitors of Univ. of Va.*, 115 S. Ct. 2510, 2519-20 (1995) (the scarcity of a government benefit does not render it immune from constitutional limitations).

[72] *In the Matter of Social Contract for Continental Cablevision*, 10 FCC Rcd. 299 (1995); *In the Matter of Social Contract for Time Warner*, 11 FCC Rcd. 2788 (1995); *In the Matter of Cox Communications, Inc. and Times Mirror Cable Television, Inc.*, 11 FCC Rcd. 1972 (1995); *Comcast Cable Communications, Inc.*, 11 FCC Rcd. 4029 (1995).

[73] *In re Applications of Stockholders of CBS, Inc. and Westinghouse Electric Corp.*, 11 FCC Rcd. 3733 (1995).

[74] *Proposed Policy Statement and Notice of Proposed Rulemaking Re: Agreements Between Broadcast Licensees and the Public*, 58 F.C.C.2d 1129, 1135 (1975) (concurring statement of Com. Benjamin Hooks).

[75] *Id.* at 1134.

[76] *Agreements Between Broadcast Licensees and the Public*, 57 F.C.C. 2d 42, 54 ¶38 (1975).

[77] *Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd. 3911 (1990) ("*Abuses of the Commission's Processes*").

[78] *Id.* at 3912.

[79] *Id.*

[80] *Id. See also Formulation of Policies and Rules Relating to Broadcast Renewal Applicants, Competing Applicants, and Other Participants to the Comparative Renewal Process and to the Prevention of Abuses of the Renewal Process*, 4 FCC Rcd. 4780 (1989) (*"Abuses of the Renewal Process"*).

[81] *Abuses of the Commission's Processes*, 5 FCC Rcd. at 3914; *Abuses of the Renewal Process*, 4 FCC Rcd. at 4787.

[82] Krasnow, et al., *The Politics of Broadcast Regulation*, *supra* note 59 at 37.

[83] *Id.*

[84] Garry Abrams, *Censorship*? CALIFORNIA LAW BUSINESS, March 18, 1996 at 20, 21.

[85] Telecommunications Act of 1996, Pub. L. No. 104-104, §551, 110 Stat. 56 (1996), codified at 47 U.S.C. §303(w)(1).

[86] *Turner Broadcasting System v. FCC*, 114 S. Ct. at 2461.

[87] *Id.*

[88] *Id.*

[89] *Id.* at 2462.

[90] *Id.*

[91] *Id.* at 2464.

[92] *Id.* at 2463.

ANDREWS OFFICE PRODUCTS CAPITOL HEIGHTS, MD (K)

Policy Analysis

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Routing

REGULATION IN NEWSPEAK

The FCC's Children's Television Rules

BY ROBERT CORN-REVERE

Executive Summary

In August 1996 the Federal Communications Commission adopted rules requiring television broadcasters to air at least three hours per week of children's "educational" programming. The FCC provided little justification for imposing that requirement. Studies suggested that most broadcasters were already airing at least three hours of programming per week that would qualify as educational. And the FCC's order ignores the educational video programming for children that is available on media that compete with broadcasting, such as cable, satellite, and videocassettes. Finally, the theory behind the mandate is that the market will not provide educational programming on its own because the audience does not demand it--another way of saying that such programming cannot attract an audience. But that also means that mandates are not a solution, since the FCC cannot force anyone who would not already have done so to watch educational programming.

All this suggests that the politics of the presidential campaign, where lip service to the idea of "family values" was a favored theme, had more to do with the adoption of the rules than did a real concern for children. And while the FCC represents its rules as mere "guidelines," broadcasters who ignore the rules bear the ominous burden of proving, in a full hearing, that they have complied with the Children's Television Act of 1990. The legislative history of the CTA clearly shows that such a programming mandate was not what Congress intended when it passed the act. The FCC's rulemaking also violates broadcasters' First Amendment rights, forcing them to transmit government-approved "educational" speech.

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> Syllogisms à la Mode--If you are against labor racketeers, then you are against the working man. If you are against demagogues, then you are against democracy. If you are against Christianity, then you are against God. If you are against trying a can of Old Dr. Quack's Cancer Salve, then you are in favor of letting Uncle Julius die.
>
> H. L. Mencken[1]

> FCC chairman [Reed] Hundt has set out to wear down his colleagues' opposition to his proposal [to require broadcast licensees to transmit three hours per week of children's educational programming] in part by accusing them of waging a campaign against kids.
>
> Cleveland Plain Dealer[2]

On August 8, 1996, the Federal Communications Commission adopted new rules requiring television broadcasters to air more children's educational programming. Less than three weeks later, the Food and Drug Administration announced that it would assert jurisdiction over cigarettes and adopted rules to sharply curtail tobacco advertising. Judging by the growing number of regulations of media content that are being justified by the perceived need to protect minors, it takes a child to raze the constitutional rights of a village.

Despite the government's characterization of its regulatory action as merely setting "guidelines" to assist broadcasters with compliance, it is clear that the FCC's rules establish programming mandates that a licensee may ignore only at its peril. The lack of justification for the requirements and the twisted logic on which they are based suggest that the recent presidential campaign, in which "family values" were the Holy Grail, better explains the rules' development than does a genuine concern for children or education. In addition, the three-hour programming requirement exceeds the FCC's statutory mandate under the Children's Television Act of 1990 and encroaches on broadcasters' First Amendment rights.

The FCC's Children's Television Rules

The FCC's children's television rules emerged from a spirited debate within the agency about how to implement the CTA. That law requires television stations to transmit

"some" educational and informational programming as a condition of license. It also limits the amount of advertising that can be aired during children's programs. On one side of that debate, Chairman Reed Hundt strongly advocated quantitative programming requirements.[3] On the other, senior commissioner James H. Quello sought to avoid imposing what he saw as intrusive regulations that would violate the First Amendment.[4] The FCC decision on August 8 was viewed by many as a compromise between the two positions.

Under the new FCC rules, television stations are required to transmit a certain amount of programming "specifically designed to serve the educational and informational needs of children," although methods of meeting that requirement may vary.[5] Stations that transmit three hours per week of "core programming" may have their licenses renewed by the FCC staff, without the need for review by the full commission. Core programming is defined as that which has serving the educational and informational needs of children as a significant purpose, is aired between the hours of 7:00 a.m. and 10:00 p.m., is regularly scheduled at least weekly, is at least 30 minutes in length, and for which the educational or informational objective and the target child audience have been specified in writing by the broadcaster in advance. Broadcasters are required to list such "core" educational shows in programming guides.

A licensee who fails to satisfy that "guideline" for core programming may still have its license renewed at the staff level if it airs "slightly less than" three hours per week of core programming but demonstrates a commitment "that is at least equivalent to airing three hours per week," making up the slight deficit with public service announcements, short-form programs, and regularly scheduled non-weekly programs. Licensees that fail to meet the FCC's "processing guidelines" will be referred to the commission, "where they will have a full opportunity to demonstrate compliance with the CTA." Such stations may point to their sponsorship of core educational programs on other stations in the market, or special nonbroadcast efforts that "enhance the value of children's educational and informational television programming," or both.

In addition to meeting the programming and scheduling requirements, television licensees are required to maintain in their public files quarterly reports describing programming efforts during the preceding quarter and outlining planned efforts for the next quarter. The requirements are very detailed. They specify the day each report must be made ("by the tenth day of the succeeding calendar quar-

ter"), require stations to list the name of the individual at the station responsible for collecting comments on the station's compliance with the CTA, and require licensees to file the compiled quarterly reports with the FCC annually.

Regulation and Newspeak

The FCC characterized its children's television rules as deregulatory, claiming that "one of our objectives in this proceeding has been to encourage the public to participate in promoting broadcasters' compliance with the CTA, and to reduce the role of government in enforcing compliance."[6] Leaving aside the fact that public participation occurs only through the FCC, that remarkable statement of the commission's objectives appears on the same page of the FCC's order as warnings that the government will use the required programming reports to monitor the industry's compliance for three years and that the commission's staff "will also conduct selected individual station audits during the next three years to assess station performance." The penalty for failing to comply with the new rules can include loss of a station license.

It is far from clear, then, how the FCC's rules are deregulatory as claimed except in the most Orwellian sense. Recall the three slogans of Big Brother's ruling party in the classic 1984:

WAR IS PEACE
FREEDOM IS SLAVERY
IGNORANCE IS STRENGTH

Right. And the FCC's children's television rules "reduce the role of government."

George Orwell analyzed the odd way in which governments often use words to block, rather than to convey, meaning in his 1946 essay, "Politics and the English Language." He noted that "defenseless villages are bombarded from the air, the inhabitants driven out into the countryside, the cattle machine-gunned, the huts set on fire with incendiary bullets: this is called pacification."[7] Or to take a current example, the ambassador from Belarus recently wrote to the Washington Post to complain about a columnist who wrote that a dissident in Belarus had been arrested "for participating in a demonstration." That was simply untrue, according to the ambassador. He explained that the protester "had a perfect right to demonstrate" but had been arrested and detained for "knowingly organizing a disruptive march